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**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

FRIENDS OF ALASKA NATIONAL
WILDLIFE REFUGES, *et al.*,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as
Secretary of the U.S. Department of the
Interior, *et al.*,

Defendants,

and

KING COVE CORPORATION, *et al.*,

Intervenor-Defendants.

Case No. 3:18-cv-00029-TMB

PLAINTIFFS' MOTION TO STRIKE

Pls. Mot. to Strike

Friends of Alaska National Wildlife Refuges, et al. v. Zinke, et al., Case No. 3:18-cv-00029-TMB
Page 1 of 4

Plaintiffs, Friends of Alaska National Wildlife Refuges, et al. (collectively “Friends”) move to strike a portion of Federal Defendants’ Brief in Opposition to Plaintiffs’ Motion for Summary Judgment (DOI Br. (ECF No. 65)) that relies on post-decisional extra-record evidence to support the Secretary of the Interior’s decision to enter into a land exchange agreement (Exchange Agreement). Specifically, Friends asks the Court to strike the first paragraph on page 25 of the Secretary’s brief and associated citations.¹

This case is brought pursuant to the Administrative Procedure Act. *See* First Amended Complaint for Declaratory and Injunctive Relief ¶ 5 (ECF No. 32). It is, therefore, resolved on the basis of the administrative record before the agency at the time of the agency’s decision. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The administrative record for the Secretary’s decision to enter into the Exchange Agreement and a supplement, consisting of over 236,000 pages, were filed with the court on June 1, 2018, and June 21, 2018. Clerk’s Notice of Filing (ECF No. 44); Federal Defendants’ Notice of Filing Supplement to Administrative Record (ECF No. 47).

The Secretary’s brief cites to and relies upon a post-decisional press release to support the Secretary’s decision. The press release is not part of the administrative record. It was issued after the Exchange Agreement was signed.² The Secretary’s reliance on this document to support his decision is improper. An agency’s decision cannot be supported by post-decisional information.

¹ Consistent with Local Civil Rule 10.1(i), citations to pleadings, motions, and documents previously filed are to the page number assigned by the CM/ECF System.

² The press release refers to the signing of the agreement in the past tense. Additionally, the website indicates that while it was created on the date that the Exchange Agreement was signed, it was last edited on March 8, 2018. Press Release, Secretary Zinke Approves Initial Plan to Build a Life-Saving Road for Alaska Native Village of King Cove (Jan. 22, 2018).

Pls. Mot. to Strike

Friends of Alaska National Wildlife Refuges, et al. v. Zinke, et al., Case No. 3:18-cv-00029-TMB
Page 2 of 4

San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 602–03 (9th Cir. 2014) (explaining that an agency decision is judged on the agency record and stating that “post-decision information . . . may not be advanced as a new rationalization either for sustaining or attacking an agency’s decision.” (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450, (9th Cir. 1996))). While there are exceptions to the general rule that a Court may not consider extra-record evidence, these exceptions do not allow a court to consider post-decisional information to uphold the challenged decision. *Ctr. for Biological Diversity v. U.S. EPA*, 90 F. Supp. 3d 1177, 1197–98 (W.D. Wash. 2015) (citing *Friends of the Earth v. Hintz*, 800 F.2d 822, 828 (9th Cir. 1986)). Further, the Secretary provided no argument to meet his burden to show that one of the exceptions could apply. See DOI Br. at 25.

Striking the portion of the Secretary’s brief that cites to and offers argument to support the Exchange Agreement in reliance on this document is proper. See, e.g., *Rybacheck v. U.S. EPA*, 904 F.2d 1276, 1298 n.25 (striking portions of briefs that rely on extra-record evidence); *Natural Resources Defense Council v. U.S. EPA*, 683 F.2d 752, 753 n.2 (3rd Cir. 1982) (granting motion to strike portion of brief that relies on and refers to extra-record evidence); *Ctr. for Biological Diversity v. U.S. EPA*, 90 F. Supp. 3d at 1198–99 (striking references to and portions of briefs that rely on post-decisional information). The Court should, therefore, strike the first paragraph on page 25 of the Secretary’s brief and the associated citations and not rely on the press release.

Respectfully submitted September 4, 2018.

s/ Bridget Psarianos

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Pls. Mot. to Strike
Friends of Alaska National Wildlife Refuges, et al. v. Zinke, et al., Case No. 3:18-cv-00029-TMB
Page 3 of 4

CERTIFICATE OF SERVICE

I certify that on September 4, 2018, I caused a copy of the PLAINTIFFS' MOTION TO STRIKE to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case whom are registered with the CM/ECF system.

s / Bridget Psarianos

Bridget Psarianos

Pls. Mot. to Strike

Friends of Alaska National Wildlife Refuges, et al. v. Zinke, et al., Case No. 3:18-cv-00029-TMB
Page 4 of 4

Case 3:18-cv-00029-SLG Document 72 Filed 09/04/18 Page 4 of 4